IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * * * * * * * *	*	CRIMINAL ACTION
UNITED STATES OF AMERICA	*	13-043S
	*	
VS.	*	JANUARY 23, 2014
	*	
GERALD SILVA	*	PROVIDENCE, RI
* * * * * * * * * * * * * * *		

HEARD BEFORE THE HONORABLE WILLIAM E. SMITH

CHIEF JUDGE

(Defendant's Motions in Limine)

VOLUME II

REDACTED

APPEARANCES:

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23 JANUARY 2014 -- 2:40 P.M.

THE COURT: We're back on the record in the matter of the United States versus Silva.

Let's have counsel identify themselves for the record.

MR. DONNELLY: Good afternoon, your Honor. Terrence Donnelly for the United States.

MR. MANN: Good afternoon. Robert Mann for Mr. Silva.

THE COURT: All right. What remains, I think, is to hear argument on the three pending motions. Unless you have anything else you'd like to bring up first, we can proceed directly to that.

MR. MANN: I don't. I just want to make sure the record is clear. I think I made the record clear yesterday. If not, I'd make an offer of proof that Professor Leo has now completed the review of all the videos. I think that came out yesterday, Judge, but --

THE COURT: I think so, too.

So it's your motion, Mr. Mann, so let me hear from you first. We'll deal with your motion in limine first, and then we'll move to the others.

MR. MANN: Yes, your Honor.

As a starting point, of course, I would just incorporate the memoranda that I already filed to avoid

sort of repeating everything in those memos.

THE COURT: So let's start with -- if you don't mind, I can ask you some questions to kind of focus the argument because maybe that would be helpful.

The way I was thinking about this motion was to try to figure out what are the elements that possibly an expert would be potentially helpful on, and you talk about this in your memo. And I'm trying to make sense out of the case law that interprets the statute here. And the best that I've been able to sort of come up with in kind of broad strokes is this: That in the First Circuit there's no law that says you need an expert on the issue of whether this material is lascivious, but there's no per se rule against it either.

So I think we start with the proposition that expert testimony is at least potentially possible. And the question becomes, as it always is, whether this is something that is within the ken of the jury or not, would it be helpful to the jury or not.

So then there are what are the things that the jury is going to be required to consider in determining whether the statute was violated. And what I get out of the case law is that we have the Dost factors plus -- we're certainly not limited to the Dost

factors. That's Frabizio makes that clear. And I get out of Frabizio further, and this isn't crystal clear, in Judge Lynch's opinion: "We do not hold that the Dost factors may never be used. We hold only that they are not the equivalent of a statutory standard of lascivious exhibition, and they are not to be used to limit the statutory standard."

And I guess there is this question of beyond the Dost factors could an expert be helpful with respect to the circumstances of the production of the child pornography or the alleged child pornography, and could an expert be useful with respect to the question, quoting from her opinion, "The very different question of whether this objective reaction or intent of the viewer should be taken into account in determining whether an image is lascivious."

So these are all the kinds of things that I guess potentially an expert could be useful for.

Now, I know this is a very long question, but I'd like to set it up for you. Out of that, I got out of Professor Leo's testimony yesterday, he testified that he does not know the purposes or reason why any purchaser, presumably including this purchaser, would purchase these videos. He's taken that out by his own testimony. Do you agree with that?

MR. MANN: I do.

THE COURT: He also testified, I think, that he doesn't really have any understanding as to why someone would produce this movie or video. And he said he has an opinion that it's not child pornography and that he wouldn't change his opinion if the allegations -- if he had known these allegations of exploitation.

Do you agree that he's not being put forward as an expert on that topic, the reason why or the intent of the producer?

MR. MANN: With only one slight caveat. I think the way you at one point phrased the question was he didn't have any idea why anyone would produce this. He didn't have an idea why these particular films were produced. He wasn't asked by either party what the reason might be for producing this genre. He said he had no knowledge as to why these particular films were produced. And I agree he said that, Judge.

THE COURT: But you're not putting him on for that.

MR. MANN: I'm not putting him on for that purpose anyway.

THE COURT: We take those two things out of the picture. So now what we're left with, I think, is the Dost factors, right?

MR. MANN: The Dost factors and in my mind whatever else the Court and the jury may consider beyond the Dost factors, which Frabrizio and the model jury instructions from the First Circuit both say exist but then they don't elaborate on what those other factors are.

THE COURT: Like what?

MR. MANN: Well, Judge, when I --

THE COURT: Let's get to those in a minute. Let's talk about the Dost factors for a second. All right?

So I go through these Dost factors, and I'm just going to walk through them.

One, whether the genitals or pubic area are the focal point of the image.

MR. MANN: I think he helps clearly on that.

THE COURT: How so?

MR. MANN: First, he specifically talks about where the camera zooms and where it doesn't zoom; how the camera generally had pictures of the whole scenario, that they didn't just focus on the genitals. He said there were scenes where the genitals were present. He talked about how there were pictures of faces. I think he talked about how there were pictures of everybody in the scene, for example. He talked

about how often you had wider shots, Judge.

And much of this merges with the question of whether he's describing the evidence. And this gets to the question of whether we played all these videos for the jury, could they also pick that out or not.

THE COURT: Let's just assume -- this is where I am right now. Maybe Mr. Donnelly can get me to change my mind, but I think you've got to play -- you're asking that all the videos be played, right? Is that your request?

MR. MANN: As of now. Some of this depends on whether Professor Leo is allowed to testify as a 611 or -- if he's allowed to testify as a witness, Judge, under either 611 or 1006.

Even if I put on all the videos, the question would be do I put on all parts of the videos. That might depend on what Mr. Donnelly shows. But as of now, I'm reserving the right to call all the videos and play them in their entirety. I would expect to play them at a faster speed than normal.

THE COURT: My feeling is if you ask that all the videos be played, then they're all going to be played. That's totally in your control. I'm not going to stop you from presenting the videos as evidence.

MR. MANN: But even if I play all the videos,

just focusing on the first factor, whether the genitals or pubic area are the focal point of the image, the whole point, I think, of my argument is that what Professor Leo gives the jury is two things. One, he gives them an overview of all these movies. It's hard to inquire -- he took detailed notes while he was looking at these things. He's used to watching movies critically, Judge. He was probably able, based on his background, to synthesize or understand what was in these movies and grasp more of it than an average juror. He testified significantly --

THE COURT: Look, I haven't seen the movies. So I could see the argument if there was some photo or some scene or something where the Government was clearly going to say that the genitals or pubic area is clearly the focal point of this scene and you wanted to use him to say -- using his expertise that, No, it isn't; it's something else and here's why. I get it. You know, from a cinematography point of view or film point of view that, you know, the real focal point is something else and you just don't know that because you don't know how to -- we don't know that or the jury wouldn't know that because we don't know how to critically watch films. Okay. I might give you that. But from what I heard about the films, they're not like

that. They're just a static camera angle and all this stuff that's going on.

MR. MANN: Well, there's a lot of movement. There's a lot of movement in these films when you see them, Judge, and my impression is that both the camera moves and the actors move, but I'm less sure about the camera moving. That's a point that Professor Leo would make. But the whole point is that I suspect what the Government is going to do is show some images, and those images will show the genitalia of boys.

Now, we want to say that, with respect to number one, that the genitals weren't the focal point of the image, Judge. To view that, you've got to view the film in context. Professor Leo can do that and he can say, Look, it didn't zoom in just on the genitals.

Now, I can certainly argue that it didn't zoom in on the genitals, but there's the case that I cite in my memo that says the argument of counsel is likely to be less persuasive than the statement of an expert witness. That's what he brings to the table with respect to that first factor, the very factor of whether or not they were the focal point, Judge. He can do it better, I suspect, than somebody without film training. Not suspect. I would argue that he can very clearly. That's one of the things he was looking for

when he did this.

This jury is not going to have, presumably, two things that Professor Leo had. They're not going to have the advantage of knowing the Dost factors in advance; and two, they don't have his background to know what to look for, Judge.

THE COURT: Well, knowing the Dost factors and what other factors is something we can always talk about instructing the jury on early. That's a possibility, but that's another matter.

So the second Dost factor is whether the setting of the image is sexually suggestive; i.e., a location generally associated with sexual activity.

Why can't the jury figure that out for themselves?

MR. MANN: I'll tell you exactly why. They could probably -- the question is, is a beach with nude boys a sexually suggestive setting or is a beach with nude boys a setting for naturalism or nudism?

Well, Professor Leo can say that some of these settings -- I think he would say, Judge, he did say -- he does say in his summary, Judge, that there's nothing sexually suggestive about that.

THE COURT: I thought he said -- maybe it was on cross-examination, that he had no special knowledge

about naturalism or nudism. Did I get that wrong?

MR. MANN: No. But he did say, Judge, that -- he talked about the settings. He clearly has a knowledge of what "settings" are, and he clearly would offer an opinion, Judge, that the settings -- and I have this in the summary. I just found it here.

He says on paragraph two of his summary: "That the settings of the videos are not sexually suggestive; that even when the settings include beds they were not sexually suggestive; that some of the scenes involved massages, but the massages appeared to be more caring than sexual. Many of the setting such as the ones involving food might be described as silly but not as sexually suggestive."

THE COURT: I don't understand why anything about his expertise, his expertise in film studies helps the jury -- he may have an opinion about that. Fine. You know, Mr. Donnelly may have a different opinion. We all may have opinions about it. But why is his opinion one that the jury should receive as an expert's opinion?

MR. MANN: Because he has this history of knowledge not just of films but of films in this genre, Judge, films involving issues involving sexuality. And he's sitting here and giving this jury an opinion that

says these settings aren't necessarily sexually suggestive and that they're not necessarily, but they aren't.

Sure, some of the things are obvious. An olympic-size pool is not a sexually suggestive setting. I'm more concerned about the jury thinking, Oh, you see nude boys in a sleeping car in a train, that's sexually suggestive.

I think Professor Leo can bring something to the table, a lot, when he says that's not a sexually suggestive setting. Now, the jury can accept or reject his opinion, but it's based not just on his film expertise but his film expertise in this genre, Judge, and I think he does add a lot there.

THE COURT: All right. Unnatural poses or inappropriate attire considering age.

MR. MANN: Well, he talked about how -- there, again, he talked, Judge, about the kids were playing games. They were having these mock sword fights. He talked about the silliness of the food fights. And he talked about the youths being playful, being spontaneous. He talked a whole lot about spontaneity of the youths. So when you look at that and you look at number three, Judge --

THE COURT: How is he an expert on that? I

mean, I guess I'm not seeing that. All he's doing is repeating what he saw in the film. The jurors can watch the film and see the same thing.

MR. MANN: Judge, let me give you a specific example where I don't think the jurors will see the same thing.

THE COURT: Okay.

When he and I watched these films, and I had very little knowledge of films, I did not pick up on the use of implements as a method of the children playing with each other, things like the swords, the other things like that, Judge. He picked up on that. Now, maybe some jurors will pick it up; maybe some won't. He looks at this movie and he sees a scene and he sees a bunch of different things all at once. He sees which way the camera is going. He sees whether the camera is focused on the genitals. He sees whether they're using implements to play games or things like that, Judge.

He picks up on those things because he's trained to look at films critically in the same way that he would read Chaucer differently than I would read Chaucer. And that's the expertise that he brings to this, Judge. He adds to the jury's ability to understand this film. Could he teach these jurors in

one expert session to understand these films? I don't know. It's a challenge. He usually has a whole semester or so to teach students, but he can at least give them some guidance, Judge, and that's what he gives them.

It would be hard for these jurors to see these things for the first time and grasp all these different points. I think it would be like, to continue the comparison, having them read Chaucer once and answer questions about it.

THE COURT: All right. The next one is whether the image suggests sexual coyness or willingness to engage in sexual activity. I didn't hear him testify about that. I don't know if it was in that summary.

MR. MANN: Well, he clearly testified yesterday, and I know the Government objects to the use of the Calvin Klein photographs, Judge, but he clearly compared the use here to what was going on in the Calvin Klein photographs.

THE COURT: I really don't get that whole business about the Calvin Klein photographs. I mean, you could compare this to Playboy magazine and say, Well, look, it's not Playboy magazine so it must not be sexual.

MR. MANN: No. I agree you can make the same

comparison with Playboy. I think that's the whole point, that these photographs and the Calvin Klein photographs that we have, and it wouldn't matter whether they were Playboy or Calvin Klein, do not depict people in the same manner that these films do. They don't depict people in clearly sexually provocative or coy images, Judge, the phrase that -- the language is sexual coyness or willingness to engage in sexual activity.

Playboy in their spread or the Calvin Klein ads clearly radiate sexuality, the bulges in the man's pants, the bodies hanging onto each other, the clinging. Professor Leo described a little bit of that. He can talk about that and then he can say, Look at these pictures, look at these images. There's no overt sexuality. There's no coyness in there. There's no -- you have youths playing with each other. That's what he says, Judge, literally playing as opposed to being involved in sexual activity.

Yes, he adds something to that. Could some jurors figure that out? I don't know whether they could or not. Depends on what background they have in film, Judge, and what they understand in film, what their exposure to other matters is, but it's a certainty that he adds to their information base for

making that sort of decision.

I mean, we're in effect asking every juror to make a decision whether or not the images suggest sexual coyness or a willingness to engage in sexual activity. Well, how are they going to do that? They're not going to do that in the abstract. They're going to do that based on their -- you're going to give them a standard instruction about life experiences, things like that.

The jurors are in effect going to be making these comparisons of their own, Judge. Professor Leo can add to the foundation by which they make them.

THE COURT: The Court has said, the First Circuit and other courts have said, as the Ninth Circuit said in Arvin: "This Circuit has held that 'lascivious' is a commonsensical term, and that whether a given photo is lascivious is a question of fact. There is a consensus among the courts whether the item to be judged is lewd, lascivious or obscene is a determination that lay persons can and should make." And it cites a string of circuit court opinions for that proposition. And in Frabizio the First Circuit seemed to adopt that point of view.

So I agree with everything you're saying. The jury is going to have to make those calls, but the

courts have said that that's something that is within the ability and the common sense of the jury.

Let's talk about number six, whether the image is intended or designed to elicit a sexual response in the viewer. I actually thought, before I heard Professor Leo testify, I thought that might be an area where his testimony could be helpful, but I have to say after listening to him I'm less convinced.

MR. MANN: Well, he does say, and it's in his summary which he repeated yesterday, Judge, that -- not repeated but adopted yesterday, that the movies might be understood as seeking to elicit a desire to be nude. That's very clear in the summary.

THE COURT: Didn't you say a minute ago that you were not putting him on for purposes of the intent of the producer? So wouldn't number six of the Dost factors, whether it's intended or designed, that would mean intended or designed by the person producing the film, right? I thought you just said that you weren't putting him on for that purpose?

MR. MANN: I'm going to retract that statement then because -- I am going to retract that statement.

To the extent that he will say that one of the -- he will say, Judge, that movies are designed to elicit any number of responses in an audience. And he

will also say, Judge, that these movies might be understood as seeking to elicit a desire to be nude. That's clear in his summary. So to the extent that that is describing what the purpose of the movies is I withdraw what I said previously.

He will say that these movies, Judge -- and he talks about this with respect to one of the other Dost factors, too, when we talk about number four, whether the child is partially clothed or nude -- I'm sorry, when we talk about number three, whether the children are in unnatural poses. He talks about it there being that the youths are depicted in a manner consistent with the context of European nudism.

So that I think what he says -- and so what he says clearly, Judge, is, Look, when you look at these pictures, I can tell you something, Jury, that these are consistent with European nudism, that these -- and I did misspeak and I apologize for that -- that these movies might elicit a desire to be nude, that nudism is a form of expression.

He will also though -- what he most importantly brings, Judge, I think, is this. He helps the jury understand these movies; and for the same reason that students take a film course, these jurors are like freshman in college. They haven't had a film course,

presumably. I mean, there might be -- I suppose in a medical malpractice case you could have a doctor on the jury who would know stuff, but then there's -- they would normally be instructed they're supposed to be limited to what they get in the way of evidence.

But assuming we have a jury that doesn't have any experts in film, he's going to give these jurors the equipment and the ability to assess what's in these movies the same way he gives it to students. And that's what I think you really bring to the table. That's what he testified he could do, Judge. He's got a breadth of experience to do that. And in that sense, I think his testimony clearly should be allowed.

I think Mr. Silva has a right to produce his testimony in that regard. I did mention -- I know there's a First Circuit case that says there's not a significant difference, but I do think he has a constitutional right to produce this evidence, Judge. I cite it in the memo. And I -- so I think it's hard -- if what you're saying is that or if the Government argues that all of this could be observed by the jury, in effect the Government is saying both sides can sort of make all these observations.

Some of these observations are clearly beyond the ken of the jury, Judge. For example, when he talks

about these films can be viewed as educational films about nudism and naturism, that this is an old European practice that embraces feelings comfortable with one's body, that this opinion is based on viewing videos which are basically based on the indictment as well as viewing the catalog of the distributor of these videos.

Later he says: These videos might be understood as seeking to elicit the desire to be nude. Nudism is a form of expression, and the nude body has long been a form of expression in the arts and that this has been controversial. He will offer his opinion that the images did not appear intended or designed to elicit a sexual response of the viewer. He'll compare the images in the videos with various advertising which employs young women.

Those are clearly things beyond the ken of the jury, Judge.

THE COURT: All right. Let me hear from Mr. Donnelly.

MR. DONNELLY: Yes, your Honor. I'm not sure where the Court would like me to start. You know, I guess the big --

THE COURT: Anywhere you want.

MR. DONNELLY: Okay. Well, I guess to start with, your Honor --

MR. MANN: Your Honor, I just want to make clear, and I really apologize, I did submit a supplemental basis referring to the Rules 611 and 1006 that those are alternative bases to --

THE COURT: Yes. I know you did.

MR. MANN: I want to make clear that those are alternative bases that I'm pressing to admit his testimony in part.

THE COURT: All right.

Go ahead.

MR. DONNELLY: Yes, your Honor. In a case where whether a given image or video depicts the lascivious exhibition of the genitals, the question is if in a world where expert testimony should be allowed on that, I suggest the First Circuit, Ninth Circuit, Seventh Circuit, 10th Circuit I think it was, or 11th Circuit, any court that's looked at this directly has rejected it. But in a world where somehow, some way an expert could come forward and testify --

THE COURT: I don't know if that statement is exactly right. Just so that we're clear, I thought the First Circuit --

MR. DONNELLY: Let me just say, Judge, the First Circuit did not have this question before it. It did not. But what it did have before it and so what I'm

saying is that Arvin certainly did. The Ninth Circuit in Arvin had the question before it: Did the judge, trial judge abuse his discretion when he excluded proffered expert testimony on the issue of whether images were lascivious or not.

THE COURT: I just refer you to Footnote 8 of Frabizio: For this reason expert testimony is not required on the subject, citing Arvin. There is at the same time no general rule that it is prohibited.

MR. DONNELLY: Right. But the question was not before the Court. And given Judge Lynch's opinion that everything you just asked Mr. Mann about the First Circuit's opinion, that all of that, lay people sitting on a jury are capable of making those determinations, one has to ask, well, what kind of expert then should be allowed to testify about these matters.

What we have before us here I think helps make your task easier because unlike the situation and I think the name of the case was **United States versus Johnson**, that was the Missouri case, where a state trooper who had all kinds of experience with actual child pornography tried to come in and testify and the trial court excluded it because the people on the jury didn't need that kind of help.

All Professor Leo, or at least the backbone of

what he wants to testify about are things that this jury can see with their own eyeballs. He's a professor of English Literature at the University of Rhode Island who since 2006 has had some kind of concentration within the English Department at URI on films.

What you're going to see, your Honor, they're not worthy of the word "film." As Dr. Leo candidly in a moment where reality, I think, broke through on him, he admitted that these movies, they don't have lighting, they don't have settings, they don't have dialog, they don't have plot although he tried to tell us that there was a plot here. They're homemade movies. That's his words, homemade movies with an adult in some personage -- and we put in the news story exhibits so you would have some background on this case, who these adults are and why these movies were being produced.

And so Dr. Leo has no particular expertise about homemade videos. You might as well bring in an expert about the Donnelly family picnic to tell us about setting and lighting. It offers no help to the jury, no particular insight.

These jurors are going to have to sit here and look at these images. This is not the worst child pornography case this Court has encountered or will

ever encounter. These are pictures of naked boys that it is the Government's position, it was the grand jury's position, it's governments throughout the world's position that they amount to child pornography. But in the end, it's going to be the jury's call. Mr. Mann is going to be able to tee up that issue and argue it to his heart's delight about all the reasons why these pictures should not amount to child pornography.

The Government for its account will expect to counter those arguments without the help of expert testimony as well. And that's what Frabizio says, that's what Arvin says. So there's a real danger here that Professor Leo, who, based on what we heard yesterday, is not going to be a real disciplined witness about whatever his expertise is in. He told us yesterday about how Eastern European boys have different muscle masses than other boys. How can he say that? How does he know that? And so he has an opinion that when one 12-year-old boy is rubbing oil in a sauna on the back of another boy that because he's not touching his genitals or buttocks, rather touching the middle and upper parts of his back, that that's not a sexualized position. I have a completely opposite view myself that I plan and hope to argue to the jury

about what that image means and why it was put in there by its maker.

And so he has no expertise in that. That's the something that Frabizio says is for a layman to decide. They don't need Professor John Leo coming in and saying, Well, that's not really a sexualized image.

A boy getting tied up, same thing. Little boy drag scenes, not sexualized.

These are the things that afford for the layman -- the Court said -- the First Circuit is clear that when it comes to expert testimony it's like any other evidentiary ruling. Mr. Mann raises a constitutional issue. Certainly he has a right to present a case, but he has to do it within the Rules. And this Court, whatever your decision is, will be measured by the abuse of discretion standard. And it's very hard to imagine after what the First Circuit said in Frabizio in light of its adoption of Arvin that the Court would find it to be an abuse of discretion.

THE COURT: That I'm not too worried about. That's not the point. I'm going to do what is right --

MR. DONNELLY: I understand, your Honor.

THE COURT: -- you know, for the fairness to the Defendant and consistent with the Rules. That's what I care about. But --

MR. DONNELLY: I don't mean to interrupt the Court, but we ended our memorandum with Rule 403, and I think given the fact that witness has no particular expertise, he knew nothing about the child pornography industry, your Honor, I would proffer to the Court that these videos were made for the sexual pleasure of the men who were purchasing them.

When I asked Professor Leo that question, frankly, I had problems with his answer when he says, I have no idea; it could be a million things. Is that why this particular Defendant bought 75 of these videos on 22 different occasions spending $1500 of his own money? Is that why individuals who purchase these videos are being prosecuted in Sweden, Mexico, Romania, Switzerland, I believe, in several different countries. This was a world-wide investigation, your Honor, and I just think that to bring in somebody who styles himself as an expert who is really maybe somebody who has more enlightenment than most of us on films, filmmaking, but he has zero knowledge about child pornography, how children are used, groomed and how people profiteer off of their exploitation in these movies, he's got nothing to add on that.

Then go to this particular case. He basically insulated himself from the facts of the case that he's

testifying about, namely, this isn't a secret, the Azov Films investigation. And he claims he has no knowledge of the makers, no knowledge of the producers, no knowledge of prosecutions that I just mentioned. No knowledge that these boys who he told us, oh, they're frolicking, they're having so much fun, how all of them were from basically low income homes, who needed a place to go and play, and who were told by the filmmakers don't tell your parents that you're being filmed nude. I'll pay you if you don't tell your parents that you're being filmed nude. Don't tell the police. If you do, you're out of here, out of our little camp, out of our little setting.

It wasn't until parents in Romania began discovering it that complaints began being made against Azov and the investigation was on, particularly in Toronto by the Toronto Police Service.

So I think for all those reasons, your Honor, it would be very prejudicial to the Government under 403 to allow this kind of testimony when it's completely unnecessary and the witness is unqualified. Thank you.

THE COURT: So Mr. Mann also has made this 611 and 1001 -- 1011 -- do I have those numbers right?

MR. DONNELLY: 1006.

MR. MANN: 1006, I think.

THE COURT: 1006.

MR. DONNELLY: Your Honor, I don't think those cases have any pertinence here. I think the argument is a bootstrapping argument. If this testimony is excludable under 702 for the reasons the Government is arguing, the fact that there are voluminous recordings, or whether they are or not is another matter, but you can't call an expert who is not otherwise allowed to testify to summarize what's on these videos.

The Government for its part plans to just play portions of these videos. As the Court said, if Mr. Mann wants to play the whole video disks, we're not going to stand in his way.

THE COURT: All right. Thank you.

MR. DONNELLY: Thank you.

THE COURT: Okay.

MR. MANN: Can I just respond very briefly?

THE COURT: Sure.

MR. MANN: There are three points I want to make. One is that even though I know the First Circuit has said that the constitutional claim doesn't trump the Rules of Evidence, I just want to press the Sixth Amendment claim in addition to the evidentiary arguments in support of using Dr. Leo.

The second thing I want to point out is that we

did go through Dr. Leo's impact on the so-called Dost factors, Judge, but both the First Circuit and the pattern jury instructions in many other courts have said that the Dost factors are not exhaustive, and they've also said that the jury may consider other factors. And to that extent, I would submit Professor Leo's testimony is another factor which they could consider.

And the third point I'd make is that whether Professor Leo is called as an expert or as a lay person, there's still a need in my mind to have somebody summarize many, many hours of tapes and whether he's qualified as an expert to do that or as a lay observer, the fact is he has now viewed all of the tapes and he should be allowed to present the summary under either Rule 611 or 1006. I think I've got the right cites, but the ones I've cited in my memo.

THE COURT: How many hours of video are there?

MR. MANN: I don't know the precise number, Judge, because we played them often at double speed or sometimes even faster speeds. I think it's comfortable to say -- if I could get the list from the indictment, Judge. It's over 20 hours, I believe. If Mr. Donnelly wants to correct me -- could I have just a moment?

THE COURT: Sure.

(Pause.)

MR. DONNELLY: Your Honor, I haven't watched every minute of these, but I would not quarrel with 28 hours being a ballpark figure. That gives the Court some idea.

MR. MANN: For example, Count VII alone has -- and I know these numbers just because we happened to have viewed them very recently, Judge. Count VII had five videos of varying length that were the basis for it. Count -- in the indictment -- excuse me. Not the indictment.

In a response to discovery, the Government lists the various tapes that are the basis for each of the first six counts. For count -- and in that document, the Government lists -- and then we made notes on it, Judge. I believe Count I has one disk, Count II has two disks, Count III has two disks, Count IV has three disks and Count V has two disks. And I can't remember exactly how many disks Count VI had, Judge. So that's five, eight, ten, not including five for Count VII plus the ones for Count VI. And in addition to that, Judge, many of these disks had, quote, "bonus features" or other things so the disks would go on. Some were short; some were long. I'd stick with my estimate of about 20 hours, possibly longer, Judge, if we play them

at regular speed.

THE COURT: All right. Thank you.

Let me just deal with this motion now. First, let me take up this argument that Professor Leo should be allowed to testify as a form of summarization under Rule 1006.

First of all, I don't think that this necessarily qualifies as a situation where the content of the recordings cannot conveniently be examined in court. I agree they may be lengthy, but it is not a situation where it's extremely difficult for the jury to put together all sorts of data that comes from various kinds of records and places and would have to make all sorts of independent calculations. You sometimes see a summary witness put all that data together into a chart or a graph or whatever it may be.

This isn't that kind of situation. It's just a matter of how much time the jury and the Court and everyone invests in watching and that's totally within your call as advocates. So I don't think it qualifies at the outset as material that cannot be conveniently examined in court.

Beyond that, after listening to Professor Leo's testimony, there's not any chance that he would be capable of succinctly presenting what's in those

videos. He was rambling and unfocused, talking about one video and another video, and he was all over the place. So I don't even think, if I did conclude that the material could not be conveniently accessed in court, that he would be an adequate summary witness. So I'm going to deny the motion to allow him to be presented in that fashion.

Now, with respect to his qualifications as an expert, the Rule 702 standard that you've all cited to talks about whether the -- if the expert is qualified, and his knowledge would help the trier of fact understand a fact in issue.

So as I understand it, Professor Leo is an expert in film and filmmaking, assuming that that's his expertise, I think that his testimony and the offer of proof doesn't establish that he could be helpful to the trier of fact on any of the issues that they're going to have to consider.

Just pulling out of his own testimony, first of all, he clearly stated as I mentioned in my questions to Mr. Mann earlier, that he doesn't know any of the purposes or reasons why a purchaser would purchase these videos. That's what he testified to. So he can't express an opinion on that.

So then I suppose there's the question of

whether he could testify on this issue of why someone would produce such a video. He did not express any expertise that would allow him to help the jury on the why or the intent of the producer. He had some opinions. They were very vague. And at some point I think, as Mr. Donnelly said, he said something like, well, there could be a lot of reasons, or as Mr. Donnelly said, he took issue with this plot question, sort of claimed there could be a narrative in there someplace, but he basically characterized it as a home movie. It's not as if he, as I thought he might, I thought he might be presented to testify as to some genre of European film and nudity or something that this could have fit into, but he doesn't appear to have any opinions about that. These are home movies, essentially.

He also said he hasn't written on issues of nudism, so I don't think he has any particular expertise in that area. He said something to the effect that physicality is part of his study expertise. I'm not even sure what that even means. But the long and the short of it is that I don't think he can testify as to the reasons why someone would produce this other than just giving essentially a lay opinion on that.

I don't think there's anything about his area of expertise that would inform the jury as to why, the intent of the person producing the film.

So that knocks out that sixth Dost factor and issues that the Circuit talked about in the Frabizio opinion that go beyond the Dost factors.

So then when you look at the Dost factors themselves, as I go through them, whether the focal point of the images are genitals or pubic area. I think the jury can figure that out for themselves. I don't think I heard anything in his testimony as to anything about any particular film or part of a film where what his understanding or expertise could really inform the jury as to why those areas were not the focal point even though they might have seemed to be the focal point. I didn't hear that from him.

His opinions about whether a setting is sexually suggestive, I think Mr. Donnelly made the point he's testifying that these various settings were not sexually suggestive. I think a juror might find that; they might find differently, but there's nothing about his expertise that tells us whether these settings are sexually suggestive. So I don't see him qualified or helpful to the jury there.

Same with the third Dost factor regarding

unnatural poses or inappropriate attire.

Fourth one, whether the child is partially clothed or nude. He's not offered for anything relating to that.

The suggestion of sexual coyness or willingness to engage in sexual activity, I didn't hear him talk about that. Again, that comes back to his sort of ipse dixit opinions that these are not sexualized images or evoke sexual connotations because he says they aren't, and that's not what 702 allows.

So in a kind of summary fashion, those are the reasons why I don't think his testimony would be helpful to the jury. I do agree that Frabizio implies to me that while not prohibited, there's certainly no requirement and no compulsion to allow expert testimony. If there's any trend, from my reading of the cases, it is against allowing expert testimony on this issue of lasciviousness.

So for all the reasons that I've stated and articulated in Frabizio and in Arvin and all the other cases that have been cited, I'm going to deny the motion to allow Professor Leo to testify.

So we can move on to the other motions. There is a motion, Mr. Mann, you've made that the term "lascivious" is unconstitutionally vague, and then I

believe you also had a motion regarding Count VII relating to the grand jury's viewing of the material. Do you want to address those?

MR. MANN: Which one do you want me to address first?

THE COURT: Why don't you take the constitutional argument first.

MR. DONNELLY: Judge, just so I'm clear, Mr. Mann had filed a motion to dismiss based on insufficient evidence being put before the grand jury as to all the counts, I believe, and then followed it up with Count VII.

THE COURT: I thought he had -- maybe I misunderstood. What don't you clarify what your motion is.

MR. MANN: Mr. Donnelly is right. I had originally filed a motion challenging the sufficiency of the evidence as to all counts. Based on the Bill of Particulars, I filed a further motion specifically challenging Count VII, so I do challenge all seven counts. They are different arguments, but I'll address the constitutional argument first.

THE COURT: Okay. Go ahead.

MR. MANN: I can just get my notes, Judge?

THE COURT: Sure.

(Pause.)

MR. MANN: This is the Defendant's motion to dismiss on the ground that the statute the Defendant's charged with violating is unconstitutionally vague. I filed a fairly detailed memorandum and a fairly detailed reply memorandum. And at the opening, I would just rely on all of those memoranda. I've highlighted certain points, but I want to make clear I'm relying on both memoranda that the defense filed.

I think the issue is pretty clear. The issue is whether or not the term "sexually" -- the Defendant has to be convicted of sexually explicit -- that the images have to be sexually explicit conduct, and the question in this case is whether the lascivious exhibition of the genitals or pubic area of any person meets that is unconstitutionally vague, Judge. And in this case, it's really the question of the lascivious exhibition of the genitals. That's what's alleged in the indictment, Judge.

What's prohibited is the receipt of images of sexually explicit conduct and then, as I said, in this particular case I think it reduces itself to whether or not the images constitute the lascivious exhibition.

Now, the argument that I make is this, that the statute, that part of the statute that talks about

lascivious exhibition of the genitals is unconstitutionally vague. The United States Supreme Court has held, Judge, that whether conduct is annoying or indecent without a narrowing of those terms is unconstitutionally vague. That was **United States versus Williams**, Judge, and they were citing to two others, Coates and Reno. And in **Reno versus American Civil Liberties Union**, 521 U.S. 844, the Court was faced with the question of whether the term "indecent" was unconstitutionally vague. And the essence of what I'm saying is here "lascivious" is the same as "indecent." It's unconstitutionally vague.

The Government, Judge, comes back and argues that the term "lascivious" has been upheld by some courts, and they cite to Miller. But the problem with all that is this, that what saved the statute from unconstitutionality in Miller was that there were other prongs to the Miller test and the term "indecency" wasn't limited just to that term. The Government also had to prove that taken as a whole that the material appealed to the prurient interest and the lack of serious artistic, political or scientific value, and there are other factors that I discuss in my memo. There's no qualifier here, Judge. All you have is this term "lascivious." And there's no way, I would submit,

that a person can be on notice as to whether or not their conduct does or does not violate the law. That's the essence of the issue in this case, and I don't think that that issue has been decided by the United States Supreme Court, Judge.

There's been a lot of talk about how "lewd" and "lascivious" are parallel terms and the fact that "lascivious" is substituted for the word "lewd" doesn't change the argument, but the essence of the argument in this case is that "lewd" doesn't provide notice in two ways. It doesn't tell the Defendant what he's forbidden to do and not do, and it doesn't provide guidance to the Government, Judge.

And when you look at the definitions that the Court of Appeals, the First Circuit has given for the proposed instructions to the jury, they talk about the so-called Dost factors, and then they say other factors that might exist but they don't define those other factors. Even in the hearing we had just a few moments ago, Judge, there was discussion by Mr. Donnelly about how in his opinion things might be sexually -- might meet the standard of child pornography and somebody else might have a different opinion, but there's no criteria. There's no way Mr. Silva could know what is and what is not prohibited, Judge. And that's what

makes the -- at the heart of it what makes these terms unconstitutionally vague.

And I'm summarizing from my memorandum. I want to make it clear that I'm relying on the entire memorandum. I'm sure the Court has read it and I'm sure the Court doesn't want me to repeat verbatim.

THE COURT: What about X-Citement Video?

MR. MANN: Let me turn to X-Citement Video. I think when you look at X-Citement Video, it becomes -- first, I don't think the Court in that case really decided the issue that I'm raising here. What the Court did in X-Citement Video was said this: First it said because Congress replaced the term "lewd" with "lascivious," that's an insubstantial difference and we reject it for the same reasons stated by the Court of Appeals. Now you go to the Court of Appeals decision in that case. And the Court of Appeals decision in that case relies on a case called Wiegand, W-I-E-G-A-N-D, 812 Fed 2d at 1243. Now, then you look at Wiegand, and Wiegand then comes back and says that "lascivious" is no different than the term "lewd."

So really what X-Citement is doing is saying "lascivious" is no different than "lewd," but that doesn't answer the question of whether or not the term is unconstitutionally vague, Judge. All it does is say

there's no difference between "lewd" and "lascivious," Judge. That's why X-Citement, I don't think, controls this case at all.

And in fact -- and then I cited in my reply memoranda to the briefs by both the Government and the Defendant or the other side, which also point to the fact that what they were focusing on in X-Citement really was this "lewd-lascivious" sort of dichotomy, Judge. Then you go back to looking at **Reno versus American Civil Liberties**, which comes after X-Citement, Judge, three years later. And in Reno, which takes place three years later, Judge, the Court rejects the argument that the Government makes that basically said -- and that's discussed in my first memo, that basically says, Look, based on Miller, there's no -- let me back up for a second.

The Court in Reno basically said they rejected the Government's argument where the Government tried to base its argument on Miller, Judge. And in effect, that's in essence what the Government is trying to do here. Miller doesn't support the result, Judge, that the Court is looking for for the same reasons that the Government's reliance in Miller was rejected in Reno, Judge.

And if I could just elaborate briefly on that.

In Reno, Judge, the Court was considering the Communications Indecency Act of 1966. They were talking about the term "indecent" and the Court -- the Government argued that the indecent standard was constitutional because it was no more vague than the second prong of the obscenity standard established in Miller. And the Court said, no, we don't accept that, and the reason the Court didn't was because Miller had other parts to the definition of "indecency," Judge, or other definitions for other prongs to the definition of "obscenity." They were talking about whether the word depicted conduct described by applicable state law and then there were the other two factors that I mentioned earlier.

So the very argument that X-Citement answers this question I think is undermined by Reno, Judge. If I can sort of depart from the cases for a second, what I understand them to be saying is, look, you need a certain amount of definition. In Miller, there was a certain amount of definition because there were three prongs to the use of the test. You don't have these three prongs here. This is statutory language. All you have is this word "lascivious" with nothing else that qualifies it. You don't have state law qualifying it. You don't have any references to any other

standards at all. And then you get to how is the Court going to make a decision, Judge.

THE COURT: How does that differ from words that Congress uses in other contexts like "brandishing" when it comes to a firearm?

MR. MANN: My answer is that I think "brandishing" is a lot easier to understand than the term "lascivious," Judge. I think if you asked a hundred people what "brandishing" meant, you'd get a pretty common answer. People might vary a little bit about whether carrying by the side of your arm versus over your head is brandishing, but you'd get a pretty standard answer about brandishing. But when you look at the term "lascivious," you could ask a hundred people and get a hundred different answers, Judge.

I mean, how was Mr. Silva to know? I would submit that when you have a law that says "brandishing," law enforcement and the defendant both get a certain message you can't be brandishing a weapon and people know what "brandishing" is. "Lascivious" could mean a hundred different things to a hundred different people and how is either the defendant or law enforcement on notice as to what it means? That's the vagueness of this statute, Judge. And in that sense, Judge, there is no notice to either law enforcement or

the defendant as to what's constitutional and what's unconstitutional.

We don't quarrel, for example, Judge, it's not applicable, but if you look at the other parts of the definition of sexually explicit conduct, sexual intercourse, that's pretty clear-cut. Bestiality, masturbation, sadistic or masochistic abuse. But this just says lascivious exhibition of the genitals. It's not just exhibition of genitals. It's lascivious exhibition. So the question is what does the term "lascivious" mean. And we have these different factors and then the Court of Appeals says, oh, but those aren't inclusive or exclusive and you can consider other factors but we don't define what those other factors are. And how is any lay person or any police officer supposed to know what's prohibited and what's not prohibited? That's what's fundamentally flawed in this statute, Judge.

THE COURT: I have some sympathy for your argument, but it seems like it's been rejected by every Court of Appeals that's confronted the question, and I don't know about district courts but I don't think you cited me to any district court case or decision holding that it's unconstitutionally vague, right?

MR. MANN: I'd have to find my original memo,

but I accept the Court's memory and I certainly don't remember any Court of Appeals decisions. So I admit and I concede in my memorandum that that are many courts that have upheld the constitutionality of the statute. But I think often what the analysis has been, unfortunately, it's been an analysis that sort of says "lascivious" is no different than "lewd" therefore we accept it without going further, Judge. And I respect the Government for pulling that phrase out of X-Citement, but I don't think X-Citement really decided this issue, Judge. I think it's still a totally open issue. In fact, I think Reno very much supports the argument, Judge.

And you asked me about brandishing and I guess my best response would be, one of my responses would be brandishing connotes a certain definiteness. Indecency alone didn't. Lasciviousness alone doesn't, Judge. Maybe lascivious with other factors, Judge, other conditions might, but they don't have them in this case. All you have is a cold statute. It's not a judicially crafted standard.

THE COURT: Well, you do have the Dost factors and other factors as the Court of Appeals has said. That's the law that we're working with, right?

MR. MANN: That's correct. But I would argue

that when the First Circuit has said, as it has, the Dost factors, but they're not inclusive or exclusive and there are other factors, that adds to the argument about the very uncertainty of the statute, Judge. Because nobody then says, well, there's the six Dost factors and these three other factors or these two other factors. We don't know whether there's one other factor or ten other factors. We don't know what those other factors are, and that adds to the very uncertainty. And it applies, I want to emphasize, both ways, both informing law enforcement as to what they can arrest somebody for and the sort of corollary that unless you have definiteness you can't prevent arbitrary enforcement of the law, and giving the defendant notice, Judge. And beyond that, I just want to make it clear that I'm relying on my memoranda. I go through these cases in some detail in my memoranda, Judge.

THE COURT: Okay. Thank you, Mr. Mann.

Mr. Donnelly?

MR. DONNELLY: Your Honor, outside of incorporating our memorandum, I think the Court is bound by the law of the Circuit. At a minimum, Frabizio answered this question with the Court holding that the word "lascivious" was not unconstitutionally

vague or overbroad. If that were not the case, certainly X-Citement Video would bind all of us here on the holding. Until the Supreme Court speaks differently, the First Circuit speaks differently, I don't know what --

THE COURT: Was the question directly in front of the First Circuit in Frabizio?

MR. DONNELLY: I believe it was, your Honor. The X-Citement Video was cited, and I believe at page 85 of the Frabizio opinion, I don't have it here in the courtroom, your Honor --

THE COURT: I have it, but I thought the procedural context of Frabizio was such that that constitutional question would not really be before the Court because this was a situation where Judge Gertner had said that under the four corners, her four corners review of these photographs, that it could not meet the definition of "lasciviousness," and she cited the Dost factors, and the Court of Appeals said that that was a misuse of the Dost factors, that she relied too exclusively on them and that that should be presented to the jury.

I don't recall that they directly confronted this question of the constitutionality of the term. Now, I grant you that it was implied pretty strongly, I

suppose, that there was not a problem with the term.

MR. DONNELLY: I just know in my memorandum here, your Honor, I cited to page 85 where X-Citement Video is noted, and then I quoted the Frabizio opinion that courts are also in agreement that the term "lascivious" is sufficiently well-defined to provide persons of reasonable intelligence guided by common understanding and practices notice of what is permissible and what is impermissible. That, of course, is the constitutional standard for what is a non-vague statute, but I don't have a copy of Frabizio here.

Then Judge Lynch's opinion went on to state that "The standard to be applied by the jury is the statutory standard. The statutory standard needs no adornment." And then she goes on about how the Supreme Court has made clear that the constitutional standard does not require additional glossing or narrowing of the standard and that in child pornography cases you don't go into the Miller three-part test, which is why I think a lot of Mr. Mann's argument is inapposite to this issue because he relies on obscenity cases where those factors are important.

In any event, I think without having the opinion in front of me, I think the Court did at least address

it. Maybe it was dicta, but I'm pretty sure the issue was squarely before them.

THE COURT: Well, just for purposes of this discussion, doesn't Mr. Mann have a point? I was trying to think of a situation that I could ask you about, and it occurred to me what if somebody very stupidly put pictures of their minor children in the bathtub on their Facebook. All right?

Now, to the parents of the children and the relatives, that might look like just a cute picture. All right? But to someone with nefarious purposes who could mine that picture off of Facebook and then publish it on the Internet, that could have a very deviant sexual purpose to it and intent. So wouldn't that in one context be not child pornography but in the second context arguably is child pornography and the question of -- and how does lasciviousness fit into that?

MR. DONNELLY: Judge, I think a hypothetical like that is kind of difficult to answer without having the full panoply of facts.

THE COURT: I just gave you the facts.

MR. DONNELLY: Right. But what did the person do with those pictures?

THE COURT: Let's say he put them out on a

peer-to-peer exchange, you know, cute picture of prepubescent girls in a bathtub for people who want that kind of stuff. We've all seen this stuff.

MR. DONNELLY: I suppose, your Honor, I'm not quite sure how to answer that question. You know, I'm not saying Mr. Mann is unreasonable in his complaints here in the Court's querying, but I think with the Dost factors and what light they shed on these various fact patterns, I can only say that in the facts of this particular case I don't think the Court is going to have that problem.

THE COURT: Reading Frabizio would suggest that the intent of the producer, that is the person putting it on the Internet, and the intent of the receiver, the person downloading it, would seem to inform the question of whether this meets the definition of "lascivious," right?

MR. DONNELLY: That's true.

THE COURT: So that's a little hard to work with.

MR. DONNELLY: I agree. These are tough cases, Judge. There's no doubt. Like I said, I don't think this one, although it depicts, as I said, not the most offensive child pornography this Court will ever see, I don't think this case is going to present that kind of

problem.

THE COURT: All right. Thank you.

Mr. Mann, I'm not unsympathetic to your arguments. I think there is vagueness that is inherent in the statutory language, but I have to agree with Mr. Donnelly that the holdings of the First Circuit in Frabizio, while I don't think it was directly in front of them, and that combined with the holdings of X-Citement Video and the various circuit courts that have confronted this question directly of whether this is unconstitutionally vague all held that it's not, and so I am going to deny the motion. I think what the case law teaches us is that we can work with this statutory language informed by the case law, the Dost factors and the other cases, pattern jury instructions, such that the jury can make a common sense determination of whether these movies meet the statutory definition of "lascivious exhibition." So for that reason, I'm going to deny the motion.

Now, we can move on to your other motion.

MR. MANN: Yes, your Honor.

Judge, I have a document I'm going to offer as an exhibit to this motion. It's part of the record. It's the Government's response to the motion for a Bill of Particulars. It informs part of this argument.

THE COURT: Fine. All right. Go ahead. We'll take that in as -- this is part of the record of the case so --

MR. MANN: Thank you.

THE COURT: Go ahead.

MR. MANN: I recognize, your Honor, as the Government has argued, that generally speaking challenges to the quality of evidence, the quantity of evidence presented to a grand jury are not viewed favorably. I understand that's the law.

In this case, Judge, I originally filed a motion challenging the evidentiary insufficiency of what was presented to the grand jury. I made as part of the record the grand jury transcript, Judge. I believe that was introduced as an exhibit yesterday, Judge, and I would just ask the Court to consider it as an exhibit for this hearing. Am I correct that we did introduce that transcript yesterday? I think we did, Judge.

THE COURT: I think that was part of your exhibits.

MR. MANN: I assume the Court doesn't want another copy for this motion.

THE COURT: No. Thank you.

MR. MANN: So I think, Judge, the counts can be divided into three categories, Judge, in this case.

If you look at, with respect to Counts I and II, the grand jury saw what is described as seconds of the video, Judge, okay? So they saw something. Apparently very little, but they saw something. I would argue that at some point the evidence has to reach some level before it constitutes evidence before the grand jury and this was a very minimal showing, but I admit that they saw some portions of those videos.

Now, with respect to Counts III through VI, the argument becomes a little different. The jury never saw those videos at all. With respect to those counts, the grand jury heard a brief description of the videos from the testifying agent, but they never actually viewed those videos at all, Judge.

And what I argue is that -- and then with respect to Count VII, there was no description of the videos that are the basis of Count VII, nor did the jury see those videos. So that's the third category with respect to the counts in terms of this motion.

I'll start with what I think is the Defendant's easiest argument, which is Count VII. Even conceding the Government's points that you usually can't challenge the quality or quantity of evidence presented to a grand jury, there has to be, I would argue, some evidence that is presented to the grand jury, Judge.

Unless the Fifth Amendment requirement that a person shall not be held to answer for capital or otherwise infamous crime unless on presentment or indictment of a grand jury is meaningless, something has to go before the grand jury on which they can base an indictment, Judge.

And with respect to Count VII there is simply nothing, I would argue, that went before this grand jury upon which Count VII could be based.

In other words, if you look at the exhibit I just submitted, and it's part of the record, the Government's Answer to the Bill of the Particulars, they list in Attachment 1 to the Answer of the Bill of Particulars, the videos which are the basis for Count VII. If one reviews the grand jury testimony, there was simply no reference to those videos in the grand jury record either having been viewed by the grand jury or having been described to by the grand jury. There is simply nothing with respect to Count VII, Judge.

And there is some case law that supports the proposition that even if you can't challenge the quality of the evidence and items like that, that the Government still has to produce some evidence to justify an indictment. And they didn't for Count VII, Judge. And on that basis, I think the motion as to

Count VII should be granted.

The arguments with respect to Counts III through VI and I and II, Judge, are a variation of the argument with respect to Count VII. They're basically an argument that says it has to be more than de minimis evidence, and what the grand jury had with respect to Counts I through VI was de minimis evidence.

I argue in my memorandum, Judge, that the Fifth Amendment has to have some substantive meaning. There's some case law that supports the defense argument, Judge. And otherwise, I would rely on my memorandum and incorporate both my original memoranda and my supplemental memoranda. Thank you.

THE COURT: Mr. Donnelly.

MR. DONNELLY: Yes, I think the Defendant's motions are foreclosed by the Supreme Court's holdings in Costello and Calandra. I don't know if the Court has any questions about that, but I think the issues --

THE COURT: What about the Count VII issue?

MR. DONNELLY: Count VII, Judge, I understand what Mr. Mann is arguing, but this is why these arguments are foreclosed. The standard is probable cause. The grand jury can rely on direct evidence. Mr. Mann I think is essentially advocating basically a Rule 29 type of standard and that's just simply not the

case. It is a probable cause standard. The jury can rely on rumor, innuendo, hearsay of all sorts in making its decision. Certainly the evidence that Inspector Connelly when he testified would generate probable cause as to Count VII where he testified at the grand jury that they seized numerous of these types of the same types of videos. And the Court will see when these videos are played, as Mr. Leo said yesterday, you get bored watching them because they're the same type of thing. They're produced for people who like to watch naked boys.

So I believe the totality of Inspector Connelly's testimony along with the exhibits that were introduced in light of the instructions that were given to the grand jury more than would justify establishing probable cause.

I want to say for the record I'm uncomfortable even making that argument, your Honor, because it's an argument a prosecutor outside of some outlandish situation where the grand jury process is being completely abused or somebody is being railroaded through the grand jury, maybe a prosecutor has to come and answer for what the grand jury did. But under Costello and Calandra I don't think we have to. This is a normal indictment issue in the normal course of

business, and Costello says that calls for a trial and that's what we'll have. Thank you.

THE COURT: All right. Thank you.

Okay. Well, once again, I think the case law is stacked very much against your arguments, Mr. Mann. And while one might have a view that perhaps the Government should produce more information to the grand jury to support an indictment, that's a call that's made by the prosecutor, not by the defendant or the Court. And I think the prosecutor has the discretion to marshal the evidence that's going to be shown to the grand jury or summarize for the grand jury in the way that it believes efficiently utilizes the grand jury's time subject to the probable cause standard. And as Mr. Donnelly has indicated, the Costello case seems to foreclose the challenge that you've brought. The Court said, "An indictment returned by a legally constituted and unbiased grand jury that's valid on its face is enough to call for a trial of the charge on the merits and the Fifth Amendment requires nothing more. Other courts have rejected similar challenges about the sufficiency of the indictment where grand jurors viewed only portions of the material alleged to constitute child pornography. The **United States versus Brose** in the Western District of New York, again, a sampling of

some 1300 images. **United States versus McLay** in the District of Maine, similar challenge. And it appears from the grand jury transcript here that the grand jurors did review snippets of these various films, "Waterlogged" -- "FKK Waterlogged," "V[redacted] Remembered, Volume I," and that they were provided with detailed descriptions of all the additional films by the postal inspector. So I think that these cases, particularly Costello combined with the evidence of what the grand jury considered requires me to reject this challenge to the indictment, so I'm going to deny the motion.

MR. MANN: I understand the Court's ruling, but I'm just concerned about one part of the Court's ruling.

THE COURT: Sure.

MR. MANN: You said that the grand jury had been provided -- a detailed description had been provided, descriptions of all the films. Just so the record is clear, I thought I had made this clear, they were not provided a description of the films that were the basis of Count VII.

THE COURT: Right. And that then takes us back to the Government's response on the Bill of Particulars, right?

MR. MANN: Right. So my only point is that I

thought you had said they had been provided a description of all the films. I just wanted to make the record clear that they had not been, and I thought I made that clear both in my memo and I thought I made it clear earlier. I just want to point that out, Judge.

THE COURT: I think you're right. It's not all films. I think it was a number of the films and the Government --

MR. MANN: None that were the basis of Count VII.

THE COURT: Well, the Government says in its response to the Bill of Particulars that to prove Count VII it will not rely on the images charged in Counts I through VI of the indictment but will rely instead on the items delineated on the attached charge. Now, you've submitted this charge, right?

MR. MANN: Yes.

THE COURT: So your point is as to Count VII, the grand jury did not review snippets of those three films that are referred to. That's your point.

MR. MANN: And that there was no description of them.

THE COURT: No description presented to the --

MR. MANN: In other words, with respect to Count

VII, Judge, there simply was nothing before the grand jury. They didn't hear a description of those films; they didn't see snippets of them. I agree they had descriptions with respect to Counts III through VI and snippets of I and II, I think it was. But on Count VII, Judge, Mr. Donnelly provided an answer to the Bill of Particulars. It listed which films were the basis for each count. With respect to the ones for Count VII, there's just no reference to it whatsoever.

THE COURT: Well, correct me if I'm wrong, but isn't the evidence that was before the grand jury that these were all films that were procured from the same producer, this Azov Films; is that right?

MR. MANN: I think that's a fair, general summary.

THE COURT: All right. So if the indictment charges that the Defendant was in possession of these films and these films were acquired from Azov Films, then isn't that indictment given the same deference that Costello requires?

MR. MANN: And the reason I would say no is this. I think a fair reading of the grand jury proceedings also indicates that they seized films that the Government doesn't allege were child pornography. At some point in some way the grand jury had to make a

decision about whether or not the films that are the basis for Count VII were child pornography, and they didn't know about those films. They knew there were films seized from Azov, some of which were described as pornographic; some of which weren't, but there's no reference whatsoever to the films that were the basis for Count VII. The argument as to Count VII is demonstrably different than it is to Counts I through VI. Counts I through VI deal with de minimus evidence, those sort of things. Count VII says there's no evidence, zero evidence before this grand jury as to those films that are the basis for Count VII. That's why I think the argument is so compelling is that Count VII -- and I apologize for standing up after your decision, but the reason I did was because I thought you had indicated they'd all been summarized for the grand jury and the ones in Count VII clearly were not.

THE COURT: If I said that, I didn't mean to imply that those were -- and I should have listed the ones that were summarized.

MR. MANN: And that's my only point that I want to make the record very clear and if the Court reconsiders its decision based on that, fine; and if it doesn't, I understand the Court's ruling but I just wanted to make the record very clear as to what I think

it is.

THE COURT: Right. What do you say to that, Mr. Donnelly? I guess I'm not sure you really did address that reality.

MR. DONNELLY: I thought I did, your Honor. One, as I cited in our initial memorandum, we just shouldn't be here doing this. In the **United States versus Guerrier**, the First Circuit held when the same types of claims were made there that we could do -- "Ultimately, we could do no better than repeat what the Supreme Court said in a related context over 55 years ago. In the ordinary course of events, a technically sufficient indictment," we have that here, nobody's disputing that, "handed down by a duly impaneled grand jury," we have that here, "is enough to call for a trial of the charge on the merits."

And every time that defendants have raised sufficiency arguments before the grand jury, they have been rejected time and again particularly in this Circuit. I know of no instance in this Circuit where such an argument as Mr. Mann has made has been allowed. That's why I pointed out to the Court, however, if the Court is concerned in any way, the fact that the totality of the evidence here, given the standard that is applied, probable cause, is more than enough to

generate probable cause for the grand jury to issue the indictment.

THE COURT: All right. Okay. Well, I think the record has been made clear, Mr. Mann, and I think ultimately I have to defer to the Costello case and the progeny of Costello on this. And so you've clarified the record, and I stand corrected as to what I said, but the motion to dismiss on that basis with respect to Count VII is denied as well.

Okay. I think that wraps it up. Is there anything else that we need to do today?

MR. DONNELLY: Nothing from the Government, your Honor.

MR. MANN: Not for the defense.

THE COURT: Let's go off the record.

(Discussion off the record.)

(Court concluded at 4:10 p.m.)

C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, certify that the foregoing is a true and correct copy of the transcript originally filed with the clerk on September 16, 2014, and incorporating redactions of personal identifiers requested by the following attorney of record: Robert B. Mann, in accordance with the Judicial Conference policy. Redacted characters appear as a black box in the transcript.

/s/ Anne M. Clayton
_____
Anne M. Clayton, RPR

October 16, 2014
_____
Date